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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DANIELA CHESLEREAN,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

_____/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Board of Immigration Appeals' ("BIA") application of a standard other than the mandatory "well-founded fear of persecution" test as enumerated in the controlling case of I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) in determining Mrs. Cheslerean's request for asylum; and in not applying the reasoning of Cardoza-Fonseca to her request for withholding of deportation?

2. Should the Court of Appeals have found that Mrs. Cheslerean's Due Process rights under the U.S. Constitution were violated when she was not allowed by the Immigration Judge to offer evidence about current conditions in Romania, particularly since the BIA subsequently took administrative notice of "drastic political changes which had taken place in Romania since (Mrs. Cheslerean's) departure from there in 1989"?

3. Did the Court of Appeals err by ratifying the BIA's novel concept of "persecution per se", an apparent bootstrapping which does not comport with alliage "persecution" as defined by the relevant case law, congressional intent, and international material on the subject?

PARTIES TO THE PROCEEDINGS

Daniela Cheslerean was the petitioner in the Court of Appeals. Respondent United States Immigration & Naturalization Service and its judicial arm, the Executive Office for Immigration Review, and its officers, the Immigration Judge and the Board of Immigration Appeals, issued the decision(s) appealed from. There are no other parties to this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDINGS.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....2

STATUTES INVOLVED.....3

STATEMENT OF THE CASE.....4

STATEMENT OF FACTS.....7

REASONS FOR GRANTING THE WRIT (ARGUMENT).....12

1. Courts are confused as to how, or whether to follow Cardoza-Fonseca...12

2. Petitioner was deprived of Due Process.....14

3. Persecution per se is not a recognized legal concept.....16

4. The INS is overruling Cardoza-Fonseca "in the field."".....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

Doe v. I.N.S., U.S. Dept. of Justice, 867 F.2d 285 (6th Cir. 1989).....12

INS v.Cardoza-Fonseca, 480 U.S. 421 (1987).....7, PASSIM

INS v. Elias-Zacarias, 112 S.Ct.812 (1992).....7, PASSIM

Kapcia v. I.N.S., 944 F.2d 702, (10th Cir. 1991).....8

Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991).....8

Shahandeh-Pey v. Immigration & Naturalization Service, 831 F.2d 1384 (7th Cir. 1985).....8

Statutes

1. 8 U.S.C.S Sections 1101, et.seq., Immigration and Nationality (The Immigration & Nationality Act) (INA):

   a. 1978 amendments to the Immigration & Nationality Act P.L. 95-549...PASSIM

   b. 8 U.S.C.S. Section 1158(a), INA Section 208(a) 12,PASSIM

   c. 8 U.S.C.S. Section 1253(h), INA Section 243(h) 12,PASSIM

   d. 8 U.S.C.S. Section 1101a(42), INA Section 101(a)(42) 12,PASSIM

   e. 8 U.S.C.S. Section 1105a(a)(4), INA Section 106(a) 12,PASSIM

   f. 8 U.S.C.S. Section 1251(a)(2), INA Section 241(a)(2) 12,PASSIM

2. The Refugee Act of 1980, P.L. 96-212..12

3. 19 U.S.T. 6223, 606 U.N.T.S. 267, Jan. 31, 1967 (modifying the United Nations Convention Relating to the Status of Refugees, July 28, 1951,189 U.N.T.S. 137) "1967

United Nations Protocol Relating to the Status of Refugees".....14-15

Legislative History

1980 U.S. Code Cong. & Admin News, 141 (Senate Report No.96-256).....16

1978 U.S. Code Cong. & Admin. News, 4704.....16

Law Review Articles

Fielden, C. Persecution on account of Political Opinion: "Refugee" Status after INS. v. Elias-Zacarias, 112 S.Ct.812 (1992), 67 Wash.L.Rev. 959.....18

Graves, M. From Definition to Exploration: Social Groups and Political Asylum Eligibility, 26 San Diego L.Rev. 739.....18

Other Sources

United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979).....16

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DANIELA CHESLEREAN, the Petitioner, pursuant to Rules 10 thru 13 of the Supreme Court, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Sixth Circuit entered on October 4, 1993.

OPINIONS BELOW

The following opinions have been delivered in this case and are included in the Appendix indexed as follows:

A. Order, United States Court of Appeals for the Sixth Circuit, 8/9/93 No. 92-4308

B. Oral Decision of the Immigration Judge 8/28/91 A29437881

C. Decision of the Board of Immigration Appeals 9/16/92 A29437881

D. Order, United States Court of Appeals for the Sixth Circuit, denying motion for rehearing 10/4/93 No. 92-4308

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.S. Section 1254(1), 28 U.S.C.S. Section 1651 and 28 U.S.C.S. Section 2350.

Federal appellate court jurisdiction was under Immigration and Nationality Act, ("INA") Section 106(a), 8 U.S.C.S. Section 1105a(a)(4), reviewing a Final Order of Deportation , issued by the immigration judge

("IJ") in Detroit and upheld by the Board of Immigration Appeals ("BIA" or "Board").

Review in this Court is available under the Hobbs Act, 28 U.S.C.S. Sections 2341 et.seq. and INA Section 106, 8 U.S.C.S. Section 1105(a)(7).

TREATIES, STATUTES, REGULATIONS INVOLVED

The primary Statute involved is the Immigration and Nationality Act of 1952, as amended, sections 101(a)(42), 8 U.S.C.S. Section 1101(a)(42); 106, 8 U.S.C.S. Section 1105a; 208, 8 U.S.C.S. Section 1158; 241, 8 U.S.C.S. Section 1251; 243(h), 8 U.S.C.S.Section 1253(h)(1).

Other Statutes involved are the Refugee Act of 1980, P.L. 96-212; and the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267, Jan. 31, 1967, and, naturally, United States Constitution,Amendment 5 ("Due Process").

Regulations involved are Title 8 C.F.R. Sections 3.1(b)(2), 208.3(b), 208.16(b), 242.21.

Relevant portions of these citations are reprinted in the Appendix, at Section E.

STATEMENT OF THE CASE

The case arose under INA Sections 208(a), 243(h), 8 U.S.C.S. Sections 1158(a), 1253(h), application for asylum and withholding of deportation, respectively; by an alien present in the United States of America, in Michigan. That is, jurisdiction over an application for asylum under INA Sections 101(a)(42), and 208(a), 8 U.S.C.S. Sections 1101a(42), 1158(a). Original jurisdiction is in the United States Immigration and Naturalization Service, Board of Immigration Appeals (Executive Office for Immigration Review).

Jurisdiction of the Court of Appeals arises under Section 106(a) of the Immigra-

tion and Nationality Act, 8 U.S.C.S. Section 1105a(a), and the Hobbs Act, 28 U.S.C.S. Sections 2340 et.seq.

This case is before the Court on a petition seeking review of a decision of the Sixth Circuit Court of Appeals upholding the Board of Immigration Appeals' final order of deportation against petitioner.

Deportation proceedings were initiated against petitioner by the INS with the issuance of an order to show cause on October 18, 1990. The order to show cause charged petitioner with being deportable under section 241(a)(2) of the Act, 8 U.S.C.S. Section 1251(a)(2), as an alien who remained longer than permitted in the United States. In proceedings below, an immigration judge found petitioner deportable as charged, ineligible for asylum, but eligible for the

privilege of voluntary departure. (App. B)1/ She timely appealed to the Board. BIA dismissed the appeal on 9/16/92 (App. C).

Timely petition for review in the Sixth Circuit Court of Appeals followed. Sixth Circuit dismissed the appeal and upheld the Board's decision on August 9, 1993 (App. A). Timely petition for rehearing was filed and was dismissed on October 4, 1993. (App. D)

This petition for writ of certiorari, followed.

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1. Citations to Appendix will be as follows: (App. ___, .) App. followed by index No., followed by page in appendix, if needed.

STATEMENT OF FACTS

Petitioner is a native and citizen of Romania who entered the United States in April, 1989, as a nonimmigrant visitor for pleasure who was authorized to remain until October 15, 1989. During her period of authorized stay, she duly filed a request for asylum with the District Director of INS, Detroit, Michigan, which was denied on October 18, 1990, in conjunction with the issuance of an order to show cause why petitioner should not be deported, asserting she was deportable for having remained in the United States longer than permitted.

Petitioner admitted the allegations in the order to show cause, i.e. "overstay". The IJ subsequently found petitioner deportable. Petitioner applied for relief from deportation in the form of asylum, witholding of deportation and voluntary departure. In support, Petitioner submitted several news

articles, an affidavit dated March 27, 1991, and a letter dating from November, 1980, written by petitioner's mother to a local court in Romania. Petitioner testified in support of her aylum claim at her asylum hearing. She testified quite extensively in regard to the persecution her family had been forced to submit to by the Romanian government because of her family's close association Western people, and her belief that the same people are still employed in similar capacities in Romania, remaining a threat to her and her family. She testified that she was fearful of renewed persecution if she returned to Romania, having now been revealed to be a "traitor" to the current regime.

Mrs. Cheslerean testified that her father was struck by a car and killed under mysterious circumstances, after having been warned not to meet with his Western

colleagues, on the evening of the day that he had met with those colleagues. Mrs. Cheslerean's mother was present at the scene of the accident. Mrs. Cheslerean testified that because of the circumstances surrounding the accident and the lack of prosecution of the perpetrator and other impressions she formed from the information available at the time, that her father's death was attributable to action by forces within the government that were inimical to his stated and acted out desire to maintain relationships with his friends in the West.

Mrs. Cheslerean's mother departed Romania for the United States in November, 1987 and remarried. Mrs. Cheslerean testified that after her mother's departure, official pressure was directed against petitioner personally and against her husband. She was interrogated on more than one occasion as to why her mother had left and her relationships

with foreigners. Her husband was subjected to similar interrogation. Their house was searched on the pretext of looking for foreign currency.

Her position at work became intolerable. In April, 1988 she was demoted for no stated reason. She believes it was because of her family's relationship with "outsiders". She testified that she began to be followed. Certain "warnings" were relayed to her that her life was in danger, like her father's had been. Her husband was not only demoted, but he was transferred to a facility more than 50 km away, which would entail him having to leave his family and residence in order to show up at work during the week.

Finally, she testified that the pressure upon her family became intolerable, and Mrs. Cheslerean and her husband managed to purchase passports for $5000 apiece, money

which they borrowed from Western sources, and they managed to obtain visas and escape Romania.

Mrs. Cheslerean testified that when she does manage to contact Romania, she feels as if someone is listening in on the conversations. The warnings about not coming back have been repeated to her.

At the evidentiary hearing, counsel for Mrs. Cheslerean attempted to corroborate Mrs. Cheslerean's testimony with testimony of her mother, but the IJ refused to allow her to testify. In addition, counsel attempted to put on another witness, who was familiar with current conditions in Romania. The IJ, without hearing the testimony, determined it was irrelevant.

The IJ denied asylum and withholding of deportation, but granted request for voluntary departure.

Appeal, as related, followed.

REASONS FOR GRANTING THE WRIT

ARGUMENT

1. Courts are confused as to how, or whether, to follow Cardoza-Fonseca.

The basis for this petition for Writ of Certiorari is that the opinion issued by the Sixth Circuit Court of Appeals is inconsistent with the controlling decision of the Supreme Court, Cardoza-Fonseca, and its interpolation by Elias-Zacarias 112 S.Ct. 812, and subsequent decisions of the Circuit Courts pursuant to those decisions. By doing so, the Sixth Circuit has ratified an independent Standard of Review by the Board of Immigration Appeals that is not justified by either the prior decisions of the Sixth Circuit ,e.g. Doe v.I.N.S., U.S. Dept. of Justice, 867 F.2d 285 (6th Cir. 1989) or the specific directives of the U.S. Supreme Court (Cardoza-Fonseca).

Applying no standard is equivalent to applying the incorrect standard. Is Cardoza-Fonseca the law or is it not? Are the Circuits free to apply some other test?

The Court of Appeals admits, in its opinion, (App A, 9) that "there is no indication that the Board applied this test (well-founded fear under Cardoza-Fonseca) to Cheslerean's Asylum claim."

The Court concluded, instead, that the Board found that Cheslerean had "presented no evidence that the present Government in Romania presently is, or ever will be, interested in persecuting her for any reason."

The Literature and Legislative history leading up to the Refugee Act of 1980, P.L. 96-212, including the United States' signing of the 1967 United Nations Protocol Relating to the Status of Refugees, indicate that the intent of Congress was to liberalize the

Asylum law and harmonize the United States government's position on refugees with the rest of the world's. Cardoza-Fonseca seems consistent with that view. Cases decided in the wake of Elias-Zacarias, however, have sent the law off on a dangerously restrictive tangent that is obviously at odds with the promises of our international commitments, i.e. federal law enacted by the signing of treaties. Unpredictability is the dominant feature of the current state of the law. Unpredictability leads to lack of respect for the law, and ultimately, to disregard for the law. It is imperative for this Court to put the law of asylum back on a consistent path.

2. Petitioner was deprived of Due Process.

The Board based its finding that the present government in Romania had no interest in persecuting petitioner on (1) her not presenting evidence on this point (even

though the IJ refused her request to present a witness on current conditions in Romania), and (2) its taking "administrative notice (footnote omitted) of the drastic political changes that have occurred in Romania since the respondent's departure from there in April 1989." (App. C ,11). The taking of administrative notice appears to have been improper. See, e.g. Kapcia v. I.N.S., 944 F.2d 702, 705, (10th Cir. 1991); and Rivera-Cruz v. I.N.S., 948 F.2d 962, 967 n4 (5th Cir. 1991).

Thus, the Appeals Court upheld both the decision of the Immigration Judge not to allow the testimony; and the decision of the Board that Cheslerean had presented no evidence in regard to the present regime in Romania. Putting a potential deportee in such a legal predicament is certainly not within the tradition of our American jurisprudence, and is in violation of the due

process clause of Amendement 5 to the Constitution, See, e.g. Shahandeh-Pey v. Immigration & Naturalization Service, 831 F.2d 1384 (7th Cir. 1985).

3. "Persecution per se" is not a recognized legal concept.

The Court of Appeals placed especial reliance upon the Board's finding that Cheslerean had not been persecuted in the past, opinion, (App.A ,4).

The Court of Appeals upheld the Board's finding that "demotions at work and the search of their home did not establish persecution per se, Opinion p. 3 (App.A, 6).

Nowhere in all the literature or in all the case law can be found a definition of "persecution per se". However, the 1978 Amendments to the Immigration & Nationality Act, P.L. 95-49, in its legislative history, as stated in 1978 U.S.Code Cong. & Admin

News, at 4704, states "The harm or suffering need not be physical but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." The deliberate demotion, and transfer to a location more than 50 km away in Romania, so that Mrs. Cheslerean's husband could not live with his family and still remain employed, would seem to fit well within these criteria.

Elias-Zacarias does not seem to change this definition, but it adds, in the context of a political refugee, that there may be a further requirement of proving motivation on the part of the governmental entity.

However, the analytical literature has been fecund in motivational analysis, though mainly relating to governmental motivation in

the context of refugee law.2/

2.Particularly enlightening is the article by Graves, M. From Definition to Exploration: Social Groups and Political Asylum Eligibility, 26 San Diego L.Rev.739,810-12.

> The more common situations--those which prompted the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act--involve generally 'oppressive' often unstable governments which treat certain groups in particularly abusive ways. Such governments sometimes do not care, and often do not explore carefully, whether target individuals actually have disfavored views or traits (footnote omitted). When such attacks single out particular 'social groups'--even if conducted with utter indifference as to individual characteristics--they are 'covered' persecution.

The problem of motive in relation to Elias-Zacarias is also discussed in Fielden, C. Persecution on account of Political Opinion: "Refugee" Status after INS. v. Elias-Zacarias, 112 S.Ct.812 (1992), 67 Wash.L.Rev. 959, 976.

4. The INS is overruling Cardoza-Fonseca "in the field."

Cardoza-Fonseca is being overruled "in the field". INS feels free to apply whatever standard it may choose, willy-nilly, or in this case, no standard at all, to decide asylum and withholding of deportation cases.

In this case, the BIA ignored Cardoza-Fonseca and used other unclear criteria, seemingly related to sufficiency of evidence, but grounded in the novel concept of "persecution per se". Analysis is deterred because the criteria are not formalized. The other of the two main underpinnings of the Board's decision was its taking administrative notice of the fact of drastic political changes in Romania.

Proof in asylum cases is generally conceded to be hard to accumulate. It is well-established that asylum cases are rarely corroborated and proceed with little more

than the testimony of the potential asylee. In this regard, Cardoza-Fonseca and other cases stress the fact that fear is something that is personal to the potential victim, and cannot often be corroborated by the most ideal types of proof. In other words, the fear felt by the asylum applicant often has a strong subjective component.

The Board injected, and the Court of Appeals ratified, the requirement of petitioner proving "invidious" motivation on the part of the persecuting government, even though Elias-Zacarias appears to limit its motivational analysis to the "political" refugee context, rather than the social grouping advanced in support of Cheslerean's claim (people with excessive contacts with Westerners during the Ceausescu era, or in these times, people who have attempted to obtain political asylum in the United States). When Mrs. Cheslerean lived in

Romania, she tried to make her life there tolerable by maintaining and cultivating ties with friends in the West, it is Mrs. Cheslerean's firm belief that the regime in Romania tried to punish her and her family.

Significant negative events befell Mrs. Cheslerean and her family in Romania. Things happened to her and her family that can be attributed to nothing other than governmental action, and if true, they consist of persecution. The "why" is because she was a member of a group the Romanian government considered dangerous. Once she became persecuted, she became a member of another group, i.e. those "traitors" that have been singled out by the government as being against the government.

Mrs. Cheslerean cannot go back to Romania. Her life there is ruined. She refused to go along with her humiliation, degradation, and the diminishment of her

value as a person, at the hands of her government, and she risked all to come to America. There is no life for her and her family in Romania. She has been in the United States for more than 4 years and has established a life here.

The law under Cardoza-Fonseca takes a real look at the plight of the refugee in these troubled times. It is a tragedy that the INS is being allowed to abort the spirit and intent of our international obligations.

The decision in this case comes very close to dismissing Mrs. Cheslerean's fears out of hand. One question remains. Whither the "well-founded fear of persecution" standard?

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

We request that the Court of Appeals be reversed. We request that the decision of the BIA be overturned, and that this case be remanded back to the INS for it to consider granting Mrs. Cheslerean asylum in the United States of America; or, in the alternative, that it be remanded to the INS to be reopened and another hearing granted so that Mrs. Cheslerean may present evidence which was not allowed or unavailable at the time of the initial hearing.; or, in the alternative, the withholding of her deportation.

Submitted this 2d day of January, 1994.

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APPENDIX TO

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INDEX TO APPENDIX

		Page
Appendix A:	Order, U.S. Ct. of Appeals 6th Circuit, 8/9/93, No. 92-4308	A1
Appendix B:	Oral Decision of the Immigration Judge 8/28/91, A29437881	B1
Appendix C:	Decision of the Board of Immigration Appeals, 9/16/92 A29437881	C1
Appendix D:	Order, U.S. Ct. of Appeals 6th Circuit, deny motion for Rehearing 10/4/93 No. 92-4308	D1
Appendix E:	Relevant Sections of Statutes and Regulations	E1

No. 92-4308

UNITED STATES COUR OF APPEALS

FOR THE SIXTH CIRCUIT

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IMMIGRATION AND NATURALIZATION SERVICE,

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_____/

FILED: August 9, 1993

ORDER

BEFORE: GUY and NELSON, Circuit Judges, and WELLFORD, Senior Circuit Judge.

Daniela Cheslerean, a Romanian native and citizen, appeals an order of the Board of Immigration Appeals denying her application for asylum or withholding of deportation under 8 U.S.C. §§1158(a) and 1253(h)(1). Her case has been referred to a panel of this

court pursuant to Rule 9(a), Rules of the Sixth Circuit. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Cheslerean was authorized to stay in the United States as a nonimmigrant visitor until October 15, 1989. Her asylum request was denied on October 18, 1990, and she was charged with deportation because she had remained in the United States for a longer period than authorized. Cheslerean conceded deportability, and an Immigration Judge ("IJ") denied her application for asylum or withholding of deportation, even though her request for voluntary departure was granted. The Board dismissed Cheslerean's appeal of that decision on September 16, 1992. Cheslerean now seeks judicial review of the Board's order.

Cheslerean alleged that her family had suffered persecution under the former

communist government of Nicolae Ceausescu because her father had political association with Romanians

in the West. She alleged that her father was expelled from the Romanian army and later assassinated, when both he and her mother were struck by an automobile. Cheslerean's mother is now a permanent resident of this country. Cheslerean alleged that she and her husband were interrogated by the police regarding her mother's departure and their contact with foreigners. Their house was searched for foreign currency and they were both demoted at work. Cheslerean also alleged that she had been followed in Romania and that a friend had warned her to leave the country.

The Board found that there was no evidence showing that the dismissal of Cheslerean's father from the army or his death had been caused by his race, religion,

nationality, membership in a particular social group, or political opinion. It also found that there was no indication that Cherslerean's mother had been mistreated by Romanian authorities. In addition, the Board found that Cheslerean had not shown that the demotions of herself and her husband, their interrogation or the search of their house were invidiously motivated. Finally, the Board found that Cheslerean had not been physically harmed or mistreated by the Romania government, that she was not politically active in Romania, and that she had never openly expressed a view contrary to the Ceausescu regime. The Board also took administrative notice of significant changes that had occurred in Romania since Cheslerean's departure. In particular, it noted the overthrow of Ceausescu, the dissolution of the former secret police, multiparty elections, the emergence of a new coalition government, and adoption of a new

Constitution which guaranteed the basic rights of free speech, assembly, association, religion and travel.

The legal tests that apply to this type of case were described in Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992).

An asylum determination involves two steps. First, the alien must show statutory eligibility for asylum by establishing a "well-founded fear of persecution." Second, if the alien shows statutory eligibility, the alien must show that the Immigration Judge should exercise discretion to grant asylum. The alien has the burden of proof at both stages.

An application for asylum is also considered to be a request for withholding of deportation, which is governed by 8 U.S.C. § 1253(h)(1). Withholding of deportation is mandatory if an "alien's life or freedom would be threatened [in the

country of deportation] on account of race, religion, nationality, membership in a particular social group, or political opinion."

Id. at 151 (citations omitted). To reverse the Board's determination in Cheslerean's case, we "must find that the evidence not only supports a contrary conclusion, bu indeed compels it." Id. at 152 (emphasis in

the original).

The record here does not compel a conclusion contrary to the Board's. First, it is not clear that either of Cheslerean's parents were persecuted by the former government in Romania, or that her father was killed because of his race, religion, nationality, membership in a particular social group, or political opinion. Similarly, Cheslerean has not shown that she or her husband were persecuted by the former government in Romania. The Board properly found that their demotions at work and the search of their home did not establish persecution per se. id. at 152-53. Moreover, Cheslerean's vague assertion that she had been followed and warned to leave the country was not sufficient to show that she had a reasonable fear of persecution. See id.

Cheslerean argues that the Board created a novel legal standard by requiring her to

show that her treatment by the Romanian authorities was invidiously motivated. However, the requirement that persecution or the fear of persecution be "on account of" a ground listed in § 1101(a)(42)(A) makes motive "critical" to the analysis. See INS v. Elias-Zacarias, 112 S. Ct. 812, 816-817 (1992); Klawitter, 970 F.2d at 152. When read in context, the Board's use of the phrase "invidiously motivated" simply indicates that Cheslerean had not demonstrated that the alleged incidents of past persecution were base on an enumerated ground.

Cheslerean's allegations also fail to show a well-founded fear of persecution in the future. She testified that she might be detained, interrogated and arrested if she returned to Romania. She also stated that it was difficult for her to contact her friends in Romania. However, Cheslerean did not offer any other evidence which might

indicate a continuing threat of persecution. Moreover, the Board noted that the political environment in Romania had imporved. Cheslerean argues that these findings were too optimistic and that she was denied due process because a witness was not allowed to testify regarding the general conditions in Romania. However, the disputed findings were clearly secondary to the Board's finding that

Cheslerean had not been persecuted in the past and that she did not have a well-founded fear of future persecution based on an enumerated ground. Further testimony about the general conditions in Romania would not have enabled her to meet this test.

At most, Cheslerean has demonstrated that she and her family had pro-western friends in Germany during the former communist regime. She has not shown that she is a refugee as defined by §1101(a)(42(A). Consequently, she is not eligible for a

discretionary grant of asylum under 8 U.S.C. §1158(a). See Klawitter, 970 F.2d at 152, 154.

Cheslerean argues that the Board's decision was not consistent with INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987), which held that an alien seeking asylum need not prove that it is more likely than not that she will be persecuted in her home country in order to show a well-founded fear of persecution. However, there is not indication that the Board applied this test to Cheslerean's asylum claim. Instead, the Board found that Cheslerean had "presented no evidence that the present Government in Romania presently is, or ever will be, interested in persecuting her for any reason."

Cheslerean also argues that the Board erred by failing to grant her request for a withholding a deportation. To be entitled to this type of relief Cheslerean must show a

clear probability that her "life of freedom would be threatened [in Romania] on a account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). Cheslerean suggests that the clear probability standard is unclear. However, this test is more stringent than the test for determining eligibility for asylum under §1158(a). Moreover, Cheslerean must still show that her life or liberty would be threatened based on an enumerated ground. She has not met this threshold requirement.

Accordingly, the Board's decision is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Detroit, Michigan

File A29437881 August 28, 1991

In the Matter of

DANIELA CHESLEREAN, IN DEPORTATION
Respondent Proceedings

CHARGE: I&N Act - Section 241(a)(2) Non-Immigrant Visitor - remain longer

APPLICATIONS: I & N Act - Section 208 Asylum, and/or withholding of deportation under Section 243(h), or in the alternative Voluntary Departure.

IN BEHALF OF RESPONDENT:
Richard A. Kulics, Esq.
401 S. Woodward - Ste 370
Birmingham, Michigan 48009

IN BEHALF OF SERVICE:
Michael Dobson, Esq.
Trial Attorney
Detroit, Michigan 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 31-year old, married female. She admitted through Counsel that she is not a citizen or national of the United States, but is a native and citizen of Romania, who entered the United States in

Chicago, Illinois, on or about April, 15, 1989, when she was admitted as a visitor for pleasure, authorized to remain in the United States until October 15, 1989. She further admitted through Counsel that on April 27, 1989, she filed a Request for Asylum in the United States and at that (sic) her Request for Asylum was denied october 18, 1990. Lastly, she conceded through Counsel that she has remained in the United States beyond October 15, 1989 without Service permission and that she is subject to deportation on the above mentioned charge. Based on the foregoing, I find that deportability has been established by clear, convincing, and unequivocal evidence.

Respondent declined to designate a country to which her deportation should be directed if required by law. She was advised that her deportation if required, would be directed to Romania, the country of which she is a native and citizen. She thereuon

submitted an Application for Asylum (Group Exhibit 2).

An asylum request made after the institution of deportation proceedings, is also considered a request of withholding of deportation pursuant to Section 243(h) under the Immigration and Nationality Act, as amended (hereinafter referred to as "The Act"). 8 C.F.R. 208.3(b).

An applicant for withholding of deportation or asylum bears the evidentiary burdens of proof and persuasion in connection with any application under Section 243(h) or Section 208 of The Act. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Acosta and Matter of Mogharrabi, 19 I&N Dec. 439. The applicant must establish the facts underlying

his claim for such relief by a preponderance of credible, probative evidence, He must also establish that the facts proven satisfy

the stutory standards of eligibility for these forms of relief. Id.

To be eligible for withholding of deportation pursuant to Section 243(h) of the Act, the facts shown by the alien must demonstrate a clear probability of persecution in the country designated for deportation, on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Stevic, 467 U.S. 407 (1984). This means that the alien's facts must establish that is more likely than not that he would be subject to perscution for one of the grounds specified. Id.

To be eligible for asylum under Section 208 of The Act, the alien must meet the definition of a "refugee", which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or

political opinion. Section 101(a)(42)(A) of The Act; Aection 208 of The Act. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The applicant for asylum must establish a well founded fear if he shows that a reasonable person in the

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circumstances would fear persecution for one of the five grounds specified in The Act. Matter of Mogharrabi, supra.

The Respondent bases her claim of a fear of persecution by the Romanian authorities should she return to there on the following facts. Respondent claims that she has been selected, singled out, and humiliated by the Romanian government because of former contacts with the West which her father had. The Respondent stated that her father was a high-ranking member of the romanian army and that he was discharged from the romanian army

in 1975 because he had friends who were from Germany. Respondent claims that her father died, October 5, 1980, after both he and her mother were struck by an automobile driven by an individual. Respondent claims that her mother subsequently sought to prosecute this individual but nothing ever came of it. Rhe Respondent believes that this was a plot by theTomanian officials, that is, the death of her father was part of a plot to kill him because of his association with members of the Western community. Respondent claims that after graduating with a degree in Economics, in June, 1984, she secured a position with the Electrical Devices Company in Romania in September, october, 1984 as an economist. She stated that she was demoted about April 1988 from her position as economist to accountant and that she was paid less money at the same company and at the same location. She stated that her husband was also demoted at the same time and

transferred to another location. Respondent attributes this to her being her father's daughter. The Respondent also claims that her mother subsequently departed Romania in November 1987 and immigrated to the United States where she married a United States citizen in December, 1987. She claims that several times after her mother departed, police appeared at her home, searched her home for western currency and other western materials and questioned her as to why her mother had departed Romania. Respondent stated that subsequently, a friend told (sic) that her she ought to leave the United States (sic) or the same thing that happened to her father would happen to her. She claims that her friends from Germany gave both her and her husband five thousand dollars each in American money with which she purchased a passport to depart romania and come to the United States in April of 1989. She states

that she departed about a month before her husband and that she was accompanied by her child.

While the Respondent may honestly believe her version of events, I find that they are pure speculation on her part. There is no corroborating evidence, whatsoever, to substantiate her version of events. Furthermore, even if the events are as she said, I would find that there is no persecution within the meaning of Section 208 of 243(h) of The Act.

Therefore, having carefully considered the evidence in this case, including the testimony of the Respondent, I find

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that the Respondent has failed to establish her burdens of proof and persuasion in her application for asylum. She has, therefore, necessarily failed to establish the strict and clear or (sic) probability of persecution standard required for withholding of

deportation. Accordingly, her application for such relief will be denied.

The Respondent has applied,in the alternative, for the privilege of voluntary departure, and she will be granted this relief as a matter of discretion.

ORDER

IT IS ORDERED that in lieu of deportation, the Respondent be granted volunary departure without expense to the Government, on or before October 28, 1991, or any extension beyond that date that may be granted by the District director for the Immigration and Naturalization Service. And, under such conditions as the district Director may direct.

IT IS FURTHER ORDERED that if the Respondent fails to depart, when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall hereupon become immediately

effective: that the Respondent will be deported from the United States to romania on the charge contained in the Orderto Show Cause.

IT IS FURTHER ORDERED, that the Respondent's application for asylum and/or withholding of deportation under Section 243 (h) of The Act be denied.

/s/
Anthony D. Petrone, Jr.
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A29 437 881 - Detroit
Date: Sep 16, 1992
In re: DANIELA CHESLEREAN

IN RE DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Richard A. Kulics, Esq.
401 South Woodward, Suite 370
Birmingham, Michigan 48009
ON BEHALF OF
SERVICE: Michael B. Dobson
General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C. §1251(a)(2) - Nonimmigrant - remained longer than permitted

APPLICATION: Asylum; withholding of deportation; voluntary departure

In a decision dated August 28, 1991, an immigration judge found the respondent deportable pursuant to section 241(2) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(2), denied her applications for

asylum *and* withholding of deportation pursuant to, respectively, sections 208(a) and 243(h) of the Act, 8 U.S.C. §1158(a) and 12533(h), and granted her voluntary departure. The respondent has appealed, challenging only that portion of the immigration judge's decision denying her requests for asylum and withholding of deportation. The respondent's appeal will be dismissed and her request for oral argument before this Board is denied. 8 C.F.R. §3.1(e)(1992).

The respondent is a 32-year-old married female, native and citizen of Romania, who overstayed her authorized stay here as a visitor. She was placed into deportation proceedings and charged with deportability as an alien who remained longer than permitted under section 241(a)(2) of the Act. At a master calendar hearing on january 29, 1991, the respondent conceded her deportability as charged but sought relief from deportation by

way of asylum, withholding of deportation and voluntary departure. 1/ On

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1. The respondent has not contested her deportability in this appeal to the Board. February 28, 1990, the respondent appeared before the immigration judge with counsel and presented testimonial and documentary evidence in support of her claims to relief. 2/.

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2. The factual circumstances underlying the respondent to persecution are comprehensively set forth in the immigration judge's decision, and therefore, they will not be repeated here.

At the conclusion of the final hearing session on August 28, 1991, the immigration judge rendered his oral decision denying the respondent both asylum and withholding of deportation. In so doing, the immigration judge determined that the respondent's claim of past persecution as well as her claim of a well-founded fear of persecution by the Ceausescu regime, which governed Romania when she left there in April, 1989, were

speculative and uncorroborated by documnetary evidence. Voluntary departure, in the alternative, was granted. This appeal followed.

On appeal from the adverse decision of the immigration judge, the respondent alleges that several errors wre committed by the immigration judge in denying her discretionary relief. In this regard, we point out that we have chosen to review the file de novo. Accordingly, the respondent has suffered no prejudice due to any alleged error by the immigration judge.

Upon review of the record at hand and independent of the immigration judge's decition, we find that the evidence presented does not demonstrate that the respondent was persecuted in the past or that a reasonable person in her cicumstances would fear persecution in Romanis. See section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42); INS v. Cardoza-Fonseca, 480 U.S.

421(1987); INS v. Elias-Zacarias, ____ U.S. ____, 112 S.Ct. 812 (1992); Doe v. INS, 867 F.2d 285 (6th Cir. 1989); Castaneda-Hernandez v. INS, 826 F.2d 1526 (6th Cir. 1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Chen, Interim Decision 3104 (BIA 1989).

The crux of the respondent's asylum request lies in her belief that the Romanian government seeks to persecute her because of her now-deceased father's friendships with Romanians who were living in the West. The respondent maintains that, because of these friendships, her father was "kicked out" of the Romanian army in 1975 and assassinated by the Ceausescu government in 1980. The respondent's claim, however, fails in several respects.

First, the record is devoid of any evidence that her father's dismissal from the romanian army was on account of one of the grounds enumerated in the Act. Even if her

father was expelled from the Romanian army for the reason the respondent believes,

this fact does not necessarily prove that his dismissal was invidiously motivated. In like manner, simply because the individual responsible for her father's death 3/

3. The respondent's father was struck by a car as he was crossing a street and was killed.

was never prosecuted for that fatal car accident does not prove that the romanian government plotted to have her father killed on account of his race, religion, nationality, membership in a particular social group, or political opinion. 4/

4. Although respondent's counsel assigns blame for this death on the Securitate, the Romanian secret police, counsel's conclusions are not evidence in these proceedings. See Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (1980).

Second, even assuming the Romanian government was in some way responsible for

her father's death 12 years ago, the respondent has not shown that the romanian government ever sought or presently seeks to persecute her because of her relationship to her father or any one of the five grounds proscribed by the Act. Although the respondent and her husband may indeed have been demoted to less desirable positions within their respective companies, such actions are not, of themselves, "persecutory" acts within the meaning of the Act. In this regard, the respondent has failed to show that such actions were invidiously motivated. And, absent such a showing, these demotions, however difficult thay may have been for the respondent and her husband, do not support her claim to aylum relief. See INS v. Elias-Zacarias, ___ U.S.___, 112 S.Ct. 812 (1992) (observing that since "the statute makes motive critical," some evidence of the alleged persecutor's motive must be presented.) Further, such acts do not amount

to "persecution" in the absence of proof that the respondent and her husband were effectively precluded from substantial employment of the means of obtaining the basic necessities of life. We have reviewed the record in its entirety and find that no such showing has been made here. See Kapcia v. INS, 944 F.2d 702 (10th Cir. 1991); Skalak v. INS, 944 F.2d 364 (7th Cir. 1991); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992).

In spite of the warning the respondent allegedly received from an unidentified friend to leave Romania, 5/ the respondent

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5. The respondent was unable to detail the information her friend reportedly received that prompted this warning.

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was never physically harmed or mistreated in any way by the Romanian government during her residence there. The respondent pursued 4 years of college studies at a local university, secured a

professional position as an economist upon her completion of thosestudies, and enjoyed steady employment for 4 years with the same employer. 6/ The respondent was not polit-

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6. Contrary to the representations of respondent's counsel, the respondent was not fired from her job in 1988 -- she resigned. See Matter of Ramirez-Sanchez, supra.

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ically active in Romania and never openly expressed a view contrary to those of the Ceausescu regime.

There is no indication, furthermore, that the respondent's mother was ever mistreated in any way by the Romanian authorities for any reason. We note the respondent's mother left Romania in 1987 without any apparent difficulties. In this regard, the fact that the respondent was questioned on several occasions about the whereabouts of her mother following her mother's departure from Romania does not

prove or suggest that the Romanian government sought or presently seeks to persecute the respondent on account of an enumerated ground. Nor does the fact that the authorities searched her house in March 1988 for foreign clothing and currency lend support to the respondent's claim to section 208 relief absent proof of an underlying invidious motive. See INS v. Elias-Zacarias, supra; Coriolan v. INS, 559 F. 2d 993 (5th Cir. 1977); Soric v. INS, 346 F.2d 360 (7th Cir. 1965). 7/

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7. The respondent alleges in her request for Asylum in the United States (Form I-589) that she will face persecution from the Romanian government because she procured her Romanian passport illegally. To the extent the respondent would be held liable for having done so, such punishment, in the absence of an invidious motive, would necessarily be an act of "prosecution", rather than "persecution" within the meaning of the Act. See Cariolan v. INS, supra.

Moreover, even if we were incline (sic) to conclude other wise, current political conditions in Romania render the respondent's

reported fears of persecution anything but "well-founded". In this respect, this Board takes administrative notice 8/ of the drastic political changes that have occurred in Romania since the

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8. It is well established that administrative agencies and the courts may take judicial (or "administrative") notice of commonly known facts. See Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937). Therefore, this Board may properly take administrative notice of changes in

foreign governments. (footnotes omitted)

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respondent's departure from there in April 1989. In December 1989, the National Salvation Front (hereinafter "NSF"), composed of former communists, dissidents, intellectuals, students, and army generals, took power after the violent overthrow of communist dictator Nicolae Ceausescu and proclaimed Romania a parliamentary democracy based on the separation of executive, legislative, and judicial powers. The Securitate, the secret police charged with

suppressing all dissent and keeping the communist party in power, was dissolved. The NSF ruled romania until February 1990, when it joined with reepresentative of various political parties to become the Provisional council for national Unity (hereinafter "CPUN"). In May 1990, the first multiparty elections since 1946 were held nationally, and except for certain irregularities that marred the electoral process, the overwhelming majority of voters cast their ballots freely. See 1990 Country Reports on Human Rights Practices at 1253, Joint committee of the Senate and HOuse of Representative, 102d Congress, 1st Session (1991).

In the wake of wage demands by striking coal miners, a new Government committed to the economic and democratic reforms of its predecessor, emerged in September 1991 as a coalition of members of the NSF and other political parties, In November 1991, a new

Constitution, providing for multipary democracy and guaranteeing fundamental freedoms for its citizens in the areas of speech, assembly, association, religion, and travel, including the right to travel abroad and to freely immigrate, was approved by the Constituent Assembly and adopted by popular referendum in December 1991. See 1991 Country Reports on Human Rights Practices at 1218, 1223-24, Joint committee of the Senate and House of Representatives, 102d Congress, 2d Session (1992).

Laws encouraging foreign investment and calling for the privatization of most public enterprises and agricultural land have been passed while international human rights organizations have been permitted to circulate freely in Romania. In 1991, the

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Government established human rights offices in several of its ministries as well as a publicly-funded Romanian Institute for Human

Rights. See 1991 Reports at 1218, 1224.

Even though the respondent has testified to her continued fears of returning to Romania, the respondent has presented no evidence that the present Government in Romania presently is, or ever will be, interested in persecuting her for any reason. While we are mindful of the tragedy of her father's death, we nevertheless cannot conclude on this record that the respondent was persecuted in the past or that the government in Romania has a present interest in persecuting her such that a reasonable person in her circumstances would fear persecution by the Romanian government today. See Matter of Dass, Interim Decision 3122 (BIA 1988). Although the documentary evidence submitted by the respondent indicates that there have been incidents of serious internal unrest in romania, they do not speak of the respondent or her particular circumstances and do not lend support to her claim to

asylum.

In a related matter, the respondent seeks to have the case remanded for inclusion of testimony by an unnamed witness as to current conditions in Romania. We note that, in the course of the hearing, the immigration judge disallowed such testimony as irrelevant.

Although we disagree with the immigration judge's finding in this respect, we nevertheless see no reason to remand the record for inclusion of that testimony. While testimony concerning general conditions in a country is relevant to any asylum adjudication, such evidence does not, of itself, establish an alien's claim to asylum relief. See Matter of Dass, supra; Matter of Mogharrabi supra. Moreover, the respondent has failed to make any offer of proof that the elicited testimony would have changed the outcome of the case or that it would have been any different from the

information contained in the Country Reports. See Rojas v. INS, 937 F.3d 186 (5th Cir. 1991) (noting that the Country Reports are a "relatively impeccable" resource).

As a final matter, even if we were to assume that the respondent did experience persecution in Romania, or that at the time she left and for some time thereafter she had a well-founded fear of persecution should she return, it is not established that she presently warrants a grant of asylum. In Matter of Chen, supra, we stated that in certain circumstances past persecution alone might warrant a grant of asylum even if there was no reasonable likelihood of present persecution. For instance, asylum could be granted if the past persecution had been so severe that return to the country of persecution would be injumane. We do not find this to be the case here. The record, furthermore, does not disclose

any other humanitarian or compelling bases to warrant a grant of asylum under the circumstances of this case where we do not find that a well-founded fear of persecution presently exists wre the respondent to return to Romania.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that she also has failed to satisfy the clear probability standard of eligibility required for withholding of deportation. See INS v. Stevic, 467 U.S. 407 (1984). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be

granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/

FOR THE BOARD

No. 92-4308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED: OCTOBER 4, 1993

DANIELA CHESLEREAN,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

_____/

ORDER

BEFORE: GUY and NELSON, Circuit Judges, and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of the court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

Upon consideration, the panel concludes, for the reasons stated in its earlier order, that the decision of the BImmigration Appeals in this case is not inconsistent with INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The panel further concludes that the Board's decision is not inconsistent with the decision of this court in Doe v. INS, United States Department ofJustice, 867 F.2d 285 (6th Cir. 1989). The latter case in Chinese National who had become a devout evangelical Christian following his arrival in the United States. Mr. Doe presented detailed and credible evidence supporting the reasonableness of his subjective fear that the government of the People's

Republic of China -- a government that is still in power, unlike the Ceausescu government in Romania -- would subject him to persecution because of his religion if he were to return to China. No comparable

evidence has been presented in the case at bar. The panel finds that all of the issues raised in the petition for rehearing were fully considered upon the original submission, and the petition is therefore denied.

ENTERED BY ORDER OF THE COURT

/S/

Clerk

APPENDIX E

STATUTES

The Immigration & Nationality Act of 1952, as amended:

Section 101(a)(42), 8 U.S.C.S. §1101(a)(42)

(42) The term "refugee" means (A) any person who is outside of any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationalityy, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specifiy, any person who is within the country of such person's nationality or, in the case of a person having no nationality,

within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 106, 8 U.S.C.S. §1105a - Judicial Review of Orders of Deportation and Exclusion (a) The procedure prescribed by, and all the provisions of chapter 158 of Title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States

pursuant to administrative proceedings under section 242(b) of this Act of comparable provisions of any prior Act, exept that--

(1) a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(3) . . . The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony, in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs.

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the

administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

Section 208, 8 U.S.C.S. §1158 provides, in relevant part:

Asylum Procedure

(a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(b) Asylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney

General may prescribe, determines that the alien is no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in cicumstances in the alien's country of nationality of, in the case of an alien having no nationality, in the country in which the alien las habitually resided.

Section 241, 8 U.S.C.S. §1251, provides in relevant part:

General Classes of Deportable Aliens

(a) Classes of Deportable Aliens.--Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of aliens:

(1) Excludable at Time of Entry or of Adjustment of Status of Violates Status --

Section 243(h) of the Act, 8 U.S.C.S. §1253(h)(1)

(h) (1) The Attorney General shall not deport or return any alien other than an alien described in section 241(a)(4)(D) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

19 U.S.T. 6223, 606 U.N.TS. 267, Jan 31, 1967

Article II

CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United nations which may succeed it, in the exercise of its functions,

and shall in particular facilitate its duty of supervisiong the application of the provisions of the present Protocol.

REGULATIONS

8 C.F.R. §3.1(b)(2) provides, in relevant part:

Appellate Jurisdiction

Appeals shall lie to the Board of Immigration Appeals from the following:

(2) Decisions of the Immigration Judges in deportation cases, as provided in part 242 of this chapter

8 C.F.R.8.3(b) provides, in relevant part:
(b) an application for asylum shall be deemed to constitute at the same time an application for withholding of deportation, pursuant to §§208.16, 236.3 and 242.17 of this chapter.

8 C.F.R. §208.13 provides, in relevant part:

(a) the burden of proof is on the applicant for asylum to establish that he is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or las habitual residence, may be sufficient to sustain the burden of proof without corroboration.

(b) the Applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if he can establish that he has suffered persecution in the past in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that

he is unable or unwilling to return to or avail himself of the protection of that country owing to such persecution.

8 C.F.R. § 208.16(b) provides, in relevant part:

> Eligibility for withholding of deportation; burden of proof. The burden of proof is on the applicant for withholding of deportation to establish that his life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without cooroboration. The evidence shall be evaluated as follows:
>
> (1) The applicant's life or freedom

shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particual social group, or political opinion.

(2) If the applicant is determined to have suffered persecution in the past such that his life or fredom was threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.

(3) In evaluating whether the applicant has sustained the burden of proving that his life or freedom would be threatened in a particualr country on account of race,

religion, nationality, membership in a particualr social group, or political opinion, the Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for such persection if . . .

8 C.F.R. §242.21 provides, in relevant part: (a) pursuant to part 3 of this chapter an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. An appeal shall be taken within 10 days after the mailing of a written decision, or the stating of an oral decision, . . .

Supreme Court, U.S.
FILED
MAR - 7 1994
OFFICE OF THE CLERK

No. 93-1097

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIELA CHESLEREAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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FRANK W. HUNGER
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QUESTIONS PRESENTED

1. Whether the court of appeals and the Board of Immigration Appeals correctly applied the standards established in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992), when they affirmed the denial of petitioner's applications for asylum and withholding of deportation under 8 U.S.C. 1158(a) and 1253(h).

2. Whether petitioner was denied due process as a result of the exclusion of testimony by an unidentified witness regarding current conditions in Romania, and the administrative notice of government reports detailing the significant changes in the Romanian government that have occurred since petitioner's departure.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Doe v. *INS*, 867 F.2d 285 (6th Cir. 1989)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	8, 9
INS v. *Elias-Zacarias*, 112 S. Ct. 812 (1992)	5, 7, 8, 10
INS v. *Stevic*, 467 U.S. 407 (1984)	3, 9
Kapcia v. *INS*, 944 F.2d 702 (10th Cir. 1991)	11
Klawitter v. *INS*, 970 F.2d 149 (6th Cir. 1992)	6
Rivera-Cruz v. *INS*, 948 F.2d 962 (5th Cir. 1991)	11

Statutes and regulations:

Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1101(a)(42)	4, 10, 11
8 U.S.C. 1101(a)(42)(A)	3
8 U.S.C. 1158	2
8 U.S.C. 1158(a)	10
8 U.S.C. 1158(b)	11
8 U.S.C. 1253(h)	2, 9
8 C.F.R.:	
Section 208.11	11
Section 208.12	11
Section 208.24	11

Miscellaneous: Page

State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices for 1990* (Joint Comm. Print 1991) 5

State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 2d Sess., *Country Reports on Human Rights Practices for 1991* (Joint Comm. Print 1992) 5

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1097

DANIELA CHESLEREAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unpublished, but the judgment is noted at 1 F.3d 1240 (Table). The decision of the Board of Immigration Appeals (Pet. App. C1-C18) and the decision of the immigration judge (Pet. App. B1-B10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1993. A petition for rehearing was denied on October 4, 1993. Pet. App. D1-D3. The petition for a writ of certiorari was filed on January 3, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Romania who was authorized to stay in the United States as a nonimmigrant visitor until October 15, 1989. Because she remained in the United States beyond that date, she was served with an order to show cause why she should not be deported. At the deportation hearing, petitioner conceded deportability but applied for asylum under 8 U.S.C. 1158 and for withholding of deportation under 8 U.S.C. 1253(h). Pet. App. A2.

Petitioner contended that she and her family had been persecuted under the former communist government of Nicolae Ceausescu because of her father's contacts with westerners. Pet. App. A2-A3. Petitioner claimed that her father was discharged from the Romanian army because he had friends from Germany, and that after her father was subsequently struck and killed by an automobile, Romanian officials failed to prosecute the responsible individual, which petitioner believed was part of a plot to kill her father because of his associations with westerners. *Id.* at B5-B6. Petitioner also claimed that demotions she and her husband received at work were attributable to her relation to her father, *id.* at B6-B7, and that after her mother immigrated to the United States, the police, on several occasions, questioned petitioner about why her mother left Romania and searched her home for western currency. *Id.* at B7. Finally, petitioner asserted that a friend told her she should leave or the same thing that happened to her father would happen to her. *Ibid.*

After petitioner testified about these matters at the deportation proceedings, she sought to introduce testimony by an unidentified witness who purportedly had knowledge of current conditions in Romania. Admin.

Rec. 93. Petitioner's counsel acknowledged, however, that the witness had not been in Romania since petitioner had left that country and had not been in Romania while petitioner lived there. The immigration judge excluded the testimony on the ground that it would be irrelevant hearsay, based on the acknowledgement by petitioner's counsel that the witness could not corroborate petitioner's testimony regarding her individual circumstances. *Ibid.*

The immigration judge denied petitioner's applications for asylum and withholding of deportation. The immigration judge explained that in order for petitioner to be eligible for the discretionary relief of asylum, she must establish that she is a "refugee"—*i.e.*, that she is unable or unwilling to return to Romania because of "persecution or a well-founded fear of persecution * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. B4-B5; 8 U.S.C. 1101(a)(42)(A). The judge found that petitioner's "version of events" was "pure speculation on her part" supported by "no corroborating evidence," and that even if true, it did not support a finding of persecution within the meaning of the Act. Pet. App. B8.

The immigration judge also denied petitioner's application for withholding of deportation. The judge explained that to be entitled to such relief, petitioner would have to establish that there is a clear probability—that it is "more likely than not"—that she would be persecuted in Romania on account of her race, religion, nationality, membership in a particular social group or political opinion. Pet. App. B4; see *INS* v. *Stevic*, 467 U.S. 407, 424 (1984). Because petitioner had failed to establish eligibility for asylum, the immigration judge concluded that she necessarily failed to satisfy the more stringent

standard for withholding of deportation. Pet. App. B8-B9.[1]

2. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. C1-C18. The Board reviewed the case de novo and found that the record evidence "does not demonstrate that [petitioner] was persecuted in the past or that a reasonable person in her circumstances would fear persecution in Romania." *Id.* at C4-C5.

The Board found no evidence that either the dismissal or the death of petitioner's father was "on account of" one of the grounds enumerated in 8 U.S.C. 1101(a)(42). Pet. App. C5-C6. It further reasoned that even if the Romanian government was responsible for her father's death 12 years earlier, petitioner "ha[d] not shown that the Romanian government ever sought or presently seeks to persecute her because of her relationship to her father or any one of the five grounds proscribed by the Act." *Id.* at C7. The Board concluded in this regard that any demotions of petitioner and her husband were not "persecutory" within the meaning of the Act, both because she had not shown that they were invidiously motivated, and because petitioner and her husband had not been precluded from obtaining the basic necessities of life. *Id.* at C7-C8. The Board also found that petitioner "was never physically harmed or mistreated in any way by the Romanian government during her residence there," but rather was able to attend four years of college, obtain a professional position as an economist, and enjoy steady employment for four years until she resigned. *Id.* at C8-C9. It noted as well that petitioner had not been politically active in Romania, and

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[1] The immigration judge granted petitioner the privilege of voluntary departure in lieu of deportation. Pet. App. B9. The Board authorized voluntary departure as well. *Id.* at C17-C18.

had never openly expressed any views contrary to those of the former Ceausescu regime. *Id.* at C9.

The Board also found no evidence that petitioner's mother had ever been mistreated by the Romanian government. It reasoned that any questioning of petitioner or search of her home for foreign items after her mother's departure did not support a finding of persecution on an enumerated ground absent proof of an underlying invidious motive. *Id.* at C9-C10 (citing *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992)).

The Board further observed that even if it were inclined to conclude otherwise, "current political conditions in Romania render[ed] [petitioner's] reported fears of persecution anything but 'well-founded.'" Pet. App. C10-C11. The Board took administrative notice of the political changes that had taken place in Romania since petitioner's departure in April, 1989, *id.* at C11-C13,[2] and concluded that petitioner had "presented no evidence that the present government in Romania presently is, or ever will be, interested in persecuting [petitioner] for any reason." *Id.* at C14. Although it acknowledged the documentary evidence of internal unrest in Romania

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[2] The Board described the findings in the 1990 and 1991 State Department *Country Reports*, which are included in the record. See Admin. Rec. 22-29 (State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices for 1990* (Joint Comm. Print 1991); State Dep't Report to Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs, 102d Cong., 2d Sess., *Country Reports on Human Rights Practices for 1991* (Joint Comm. Print 1992)). The Board pointed to the overthrow of Ceausescu, the dissolution of the former secret police, the holding of multiparty elections, the emergence of a new coalition government, and the adoption of a new constitution. Pet. App. C10-C13.

submitted by petitioner, the Board found that such information did not relate to petitioner's particular circumstances and did not support her asylum claim. *Id.* at C14-C15. The Board rejected petitioner's request that the case be remanded for inclusion of testimony by the unnamed witness about current conditions in Romania. *Id.* at C15. The Board disagreed with the immigration judge's view that the testimony was irrelevant, but it concluded that there was no reason to remand the case because petitioner had not made an offer of proof that the testimony "would have changed the outcome of the case or that it would have been any different from the information contained in the *Country Reports*." *Id.* at C15-C16.

Finally, the Board held that even if it assumed that petitioner had experienced past persecution in Romania, or that at the time she left or for a time thereafter she had a well-founded fear of persecution should she return, a grant of asylum would not be warranted. Pet. App. C16. It found that the record did not provide any humanitarian or compelling basis to warrant a grant of asylum where it did "not find that a well-founded fear of persecution presently exists were [petitioner] to return to Romania." *Id.* at C17. Because petitioner failed to meet the standard for asylum, it necessarily followed in the Board's view that she failed to meet the higher standard for withholding of deportation. *Ibid.*

3. The court of appeals affirmed by unpublished order. Pet. App. A1-A10. It noted that to reverse the Board's determination, it would have to find "that the evidence not only supports a contrary conclusion, but indeed *compels* it." *Id.* at A5 (quoting *Klawitter* v. *INS*, 970 F.2d 149, 152 (6th Cir. 1992)). The court found that the record did not compel such a conclusion because it was not clear that either of petitioner's parents, petitioner's

husband, or petitioner herself was persecuted by the former government in Romania, and it was not clear that petitioner's father was killed because of his "race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. A6.

The court of appeals rejected petitioner's argument that the Board had created a novel legal standard by stating that she had failed to prove that her treatment was "invidiously motivated." The court of appeals pointed out that under *INS* v. *Elias-Zacarias*, 112 S. Ct. 812, 816-817 (1992), and the Sixth Circuit's own decision in *Klawitter*, "the requirement that persecution or the fear of persecution be 'on account of' a ground listed in § 1101(a)(42)(A) makes motive 'critical' to the analysis." Pet. App. A7. Thus, in context, it read the Board's finding that petitioner had not demonstrated that the past incidents she alleged were "invidiously motivated" to mean that she had not demonstrated that the incidents were "on account of" one of the criteria listed in the statute. *Ibid.*

The court of appeals also concluded that petitioner's allegations failed to show a well-founded fear of future persecution, especially since "the political environment in Romania had improved." Pet. App. A7-A8. The court rejected petitioner's contention that she was denied due process because a witness was not allowed to testify about the general conditions in Romania, concluding that "the disputed findings were clearly secondary to the Board's finding that Cheslerean had not been persecuted in the past and that she did not have a well-founded fear of future persecution based on an enumerated ground." *Id.* at A8. Further testimony about the general conditions in Romania, the court concluded, "would not have enabled her to meet that test." *Ibid.*

The court of appeals recognized that in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), this Court held that an asylum applicant need not prove that it is more likely than not that she will be persecuted in order to establish a well-founded fear of persecution. It found, however, that there was no indication that the Board had required petitioner to meet such a standard, but rather it had simply found no evidence that the present government of Romania is or ever will be interested in persecuting her. Pet. App. A9.

Finally, the court of appeals agreed with the Board's denial of withholding of deportation. Because petitioner failed to meet the asylum standard, the court concluded that she could not meet that more stringent standard for withholding of deportation. Pet. App. A10.

ARGUMENT

1. Petitioner contends (Pet. 12-14, 19-22) that the court of appeals' opinion is inconsistent with this Court's opinions in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992).[3] Petitioner also contends (Pet. 16-18) that the court of appeals applied an incorrect standard to determine whether she established that she had a "well-founded fear of persecution" if she returns to Romania.

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[3] Petitioner also asserts (Pet. 12), without analysis, that the decision below conflicts with the Sixth Circuit's prior decision in *Doe* v. *INS*, 867 F.2d 285 (6th Cir. 1989). In denying rehearing, however, the court of appeals rejected petitioner's contention that the Board's decision was inconsistent with *Doe*, pointing out that "detailed and credible evidence" supported the reasonableness of the applicant's fear of persecution in that case, while "no comparable evidence" was presented in this case. Pet. App. D2-D3. In any event, an alleged intra-circuit conflict is not a basis for review by this Court.

Petitioner misreads the court of appeals' discussion of *Cardoza-Fonseca*. The court of appeals did not find that the Board failed to apply the test of "well-founded fear under *Cardoza-Fonseca*," as petitioner contends (Pet. 13). Rather, the court found that the Board, in rejecting petitioner's asylum claim, had not held petitioner to the more stringent "more likely than not" test that is applicable to withholding of deportation claims under *Stevic* but was rejected by *Cardoza-Fonseca* for asylum claims. See Pet. App. A9. The court of appeals then pointed out that the Board simply found that petitioner presented no evidence that the current government of Romania is or ever would be interested in persecuting her. *Ibid.*[4] Thus, petitioner failed to establish a well-founded fear of persecution.[5]

Petitioner errs in contending (Pet. 16-17, 19) that the court of appeals introduced a novel concept into the law by using the phrase "persecution per se." See Pet. App. A6. That phrase merely reflected the court's conclusion that the alleged demotions of petitioner and her husband and the search of her home did not inherently rise to the level of "persecution" contemplated by the Act. The Board specifically found that petitioner had not established that she and her husband had been precluded from substantial employment or from the means to obtain the basic necessities of life. *Id.* at C8. Thus, petitioner's

[4] The Board did not "ignor[e] *Cardoza-Fonseca*," as petitioner asserts (Pet. 19). The Board cited *Cardoza-Fonseca*, as well as the Court's more recent decision in *Elias-Zacarias*, in support of its ruling. See Pet. App. C4-C5, C7, C10.

[5] The court of appeals, the Board, and the immigration judge correctly applied the more stringent "more likely than not" test only to petitioner's application for withholding of deportation under 8 U.S.C. 1253(h). See *Cardoza-Fonseca*, 480 U.S. at 423; *Stevic*, 467 U.S. at 410.

suggestion that her loss was comparable to "deprivation of liberty, food, housing, employment or other essentials of life" (Pet. 17) is contrary to the Board's factual findings.

Moreover, the Board and the court of appeals both correctly applied *Elias-Zacarias* when they rejected petitioner's claims in part because she presented no evidence that any of the actions she alleged—assuming each could be attributed to the Romanian government—was motivated by one of the factors addressed by the Act. In *Elias-Zacarias*, the Court held that the asylum applicant had failed to establish eligibility for asylum under 8 U.S.C. 1158(a), because he had not demonstrated that he feared persecution "on account of" his political opinion. The Court reasoned that a showing of a generalized political motive underlying the actions was not sufficient; rather the applicant must show that he holds a particular political opinion and that he has a "well-founded fear" that others will persecute him "*because of*" that political opinion. 112 S. Ct. at 816. Contrary to petitioner's contention (Pet. 17, 20), there is no basis for distinguishing *Elias-Zacarias* as a case involving a "political refugee." Petitioner's allegations of refugee status in this case also were politically based, and, in any event, nothing in *Elias-Zacarias* suggests that applicants claiming persecution on the basis of the other factors listed in Section 1101(a)(42) do not have to meet the same standard of showing that the persecution feared is persecution "*because of*" that factor. See *Elias-Zacarias*, 112 S. Ct. at 816.[6]

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[6] The court of appeals correctly read the Board's finding that petitioner had not demonstrated that the alleged incidents were "invidiously motivated" to mean that she had not demonstrated

2. Petitioner asserts (Pet. 14-16) that she was denied due process as a result of the immigration judge's exclusion of testimony and the Board's taking administrative notice of the change in the Romanian government.

Petitioner was not denied due process at her deportation hearing by the immigration judge's determination not to hear testimony about current conditions in Romania from an unnamed witness who had not been in Romania when petitioner was there and had not been in Romania since petitioner had left. The Board pointed out that petitioner had not made an offer of proof that the excluded testimony "would have changed the outcome of the case or that it would have been any different from the information contained in the *Country Reports*." Pet. App. C16. Moreover, petitioner's counsel acknowledged at the hearing that the witness could not have corroborated petitioner's testimony. Admin. Rec. 93.

Contrary to petitioner's assertion that "[t]he taking of administrative notice appears to have been improper" (Pet. 15), it is well settled under the authorities petitioner herself cites (*ibid.*) that the Board has authority to take administrative notice of a change of government abroad and other commonly acknowledged facts, including current events bearing on an asylum applicant's well-founded fear of persecution. See *Rivera-Cruz* v. *INS*, 948 F.2d 962, 966-967 (5th Cir. 1991); *Kapcia* v. *INS*, 944 F.2d 702, 705 (10th Cir. 1991). The Board's consideration of changed conditions is supported by the statute and companion regulations, 8 U.S.C. 1158(b); 8 C.F.R. 208.24, as is the reliance on country reports and other information reported by the Department of State, 8 C.F.R. 208.11, 208.12. Given petitioner's predominant focus on

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that the incidents were based upon—"on account of"—one of the factors listed in 8 U.S.C. 1101(a)(42). Pet. App. A7.

her fear of the former regime in Romania, the Board did not err in considering petitioner's claims in light of the undisputed fact that the former regime was no longer in control in Romania.

Finally, the court of appeals pointed out that the Board's findings about the current conditions in Romania "were clearly secondary to the Board's finding that [petitioner] had not been persecuted in the past and that she did not have a well-founded fear of future persecution based on an enumerated ground." Pet. App. A8. Thus, regardless of any change of conditions in Romania, the record clearly does not compel the conclusion that petitioner has a well-founded fear that she will be persecuted if she returns to Romania.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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